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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SPYREDON VELENTZAS,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES M. LAROSSA
Counsel of Record
LAROSSA, MITCHELL & ROSS
Attorneys for Petitioner
41 Madison Avenue
New York, New York 10010
(212) 696-9700

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Questions Presented

1. Whether the exclusion of testimony from Nalo's ex-wife regarding a conversation that she had with Nalo just prior to his murder was contrary to Second Circuit precedent and deprived petitioner of a fair trial?

2. Whether by precluding defense counsel from sharing 3500 material with their clients, petitioner was deprived of his Sixth Amendment right to counsel and his Fifth Amendment right to a fair trial?

List Of Parties

Apart from petitioner, the other parties to the appeal before the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, were Michael Grillo and Peter Drakoulis.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

SPYREDON VELENTZAS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Spyredon Velentzas (hereinafter "petitioner") respectfully

requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on July 28, 1994.

Opinion Below

A copy of the opinion of the United States Court of Appeals for the Second Circuit, United States v. Velentzas, 30 F.3d 381 (2d Cir. 1994), Docket Nos. 92-1634, 93-1117, 93-1409 (2d Cir. July 28, 1994) is annexed in the Appendix hereto at pages 1a - 18a.

Statement of Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 28, 1994. This petition for a writ of certiorari timely followed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions

The Fifth Amendment to the United States Constitution:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor[.]"

Statement of the Case

Petitioner was charged with nine other individuals in a thirteen-count superseding indictment in the United States District Court, Eastern District of New York. Petitioner was convicted, following a three-month jury trial, before the Honorable Denis R. Hurley, of racketeering, in violation of 18 U.S.C. § 1962 (c) (Count 1); racketeering conspiracy, in violation of 18 U.S.C. §

1962(d) (Count 2); conspiracy to collect an unlawful debt, in violation of 18 U.S.C. § 1962(d) (Count 3) ; operating an illegal gambling business, in violation of 18 U.S.C. §§ 1955; 2 (Counts 4 and 5); interstate transportation in aid of racketeering, in violation of 18 U.S.C. §§ 1952; 2 (Count 6); interstate transportation of wagering paraphernalia, in violation of 18 U.S.C. §§ 1953; 2 (Count 7); conspiracy to make extortionate extensions of credit, in violation of 18 U.S.C. § 892 (Count 8); conspiracy to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. § 894 (Count 9); conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (Count 13).

The jury, deadlocked at 8 to 4 in favor of acquittal, was unable to reach a verdict as to the most serious counts of the indictment, which charged petitioner

with conspiracy to murder and murder in aid of racketeering, in violation of 18 U.S.C. §§ 1952 (B)(a)(5); (B)(a)(1) (Counts 11, 12). After a second trial, the jury convicted petitioner of both of those offenses.

Petitioner was sentenced, pursuant to the United States Sentencing Guidelines, to a term of life imprisonment, a fine of $250,000 and a special assessment of $600.

On May 24, 1993, petitioner filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit. On July 28, 1994, the Court of Appeals affirmed petitioner's conviction.

Statement of Facts

(a) Introduction

The majority of the government's evidence at both trials sought to establish that petitioner ran a gambling operation, with the "protection" of the

Lucchese organized crime family, in the Astoria Section of Queens, New York. However, the fact that petitioner operated gambling establishments was largely uncontested at the first trial, and explicitly conceded and stipulated to at the second trial. On the most serious counts of the indictment, charging petitioner with conspiracy to murder Sorecho "Sammy the Arab" Nalo, the government's case was based solely on the uncorroborated testimony of Peter "Fat Pete" Chiodo -- a "capo" in the Lucchese organized crime family.

(b) The Nalo Homicide

Chiodo, who was considered the "Boss of All Astoria", admitted to an extensive criminal background, including his participation in nine homicides or attempted homicides, perjury, loan-sharking, assault, labor racketeering,

and extortion. Chiodo was, in the words of the district court, "a vicious criminal operating under a cooperation agreement with the government."

Chiodo claimed that petitioner had come to him in 1988 requesting that the Lucchese family murder Nalo on his behalf. According to Chiodo, petitioner had indicated to him that Nalo was attempting to take over petitioner's gambling operation, and that he was fearful that Nalo would kill him if he did not strike first.

Chiodo testified that he assigned one of his "associates" to assist petitioner in the Nalo homicide. According to Chiodo, petitioner lured Nalo to petitioner's own travel agency and was talking to Nalo on the phone when another of Chiodo's alleged "associates" came into the travel agency and shot and killed Nalo.

(c) The Defense Case at the First Trial

At the first trial, petitioner sought to establish that Chiodo had loaned Nalo $100,000 in connection with a rubber mat business, and that as a result of Nalo's failure to repay that loan, Chiodo -- and not petitioner -- had Nalo murdered. Chiodo not only denied ever having made the loan, but also denied ever having seen or met with Nalo, or loaned him money on any occasion. Chiodo's testimony on this score, however, was contradicted by several defense witnesses.[1]

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[1]Significantly, during the first trial the government failed to turn over unequivocal and critical material pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). This Brady material would have directly corroborated petitioner's defense at trial, i.e., that Chiodo killed Nalo because he failed to repay a loan of $100,000 that Chiodo had given him in connection with a rubber mat business. Specifically, the government never disclosed to defense counsel that at the time he was murdered, Nalo had in his possession an advertisement for a rubber door mat and two "telexes" embodying

For instance, Zacharia "Jack" Manesiotis testified that he worked at the Grecian Gardens bar, owned by petitioner. Manesiotis, who knew both Nalo and Chiodo, testified that he had seen Nalo and Chiodo together on two or three separate occasions, including at the Grecian Gardens bar.

Significantly, Manesiotis testified that four or five weeks before Nalo was murdered, he overheard Chiodo telling petitioner to tell Nalo to bring Chiodo his money or else Chiodo would kill Nalo. Manesiotis then warned Nalo that Chiodo had threatened to kill him over the dispute with the money. Two weeks later, Manesiotis learned that Nalo had been murdered.

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communications with a rubber mat company in Hong Kong. Rather, the existence of the advertisement and two telexes was not made known until the very close of the government's direct case on retrial.

Another defense witness, George Konstantineas, testified that he also knew Chiodo and Nalo, and that Nalo had asked him at the Grecian Gardens bar if he had seen "Fat Pete." One night Konstantineas saw Chiodo in the bar, who met with petitioner privately at a table. Konstantineas overheard Chiodo telling petitioner that he should find Nalo and get Chiodo's money from Nalo. He further testified that he heard Chiodo warn petitioner that if he failed to do this, Chiodo would kill both petitioner and Nalo.

The next day, Chiodo and an associate approached Konstantineas outside the bar, gave him Chiodo's beeper number and asked him to call Chiodo on the beeper if he saw Nalo. Several weeks later, Konstantineas learned that Nalo had been murdered.

(d) The Testimony of Nalo's Ex-Wife

Nalo's ex-wife, Vincenza Ferro, testified that Nalo had telephoned her shortly before he was murdered. When Ferro asked Nalo what arrangements he wanted to make to see his children over the upcoming holidays, Nalo replied that he was having problems at that time and that he did not telephone her to discuss making arrangements to see their children. When Ferro testified that she then angrily asked Nalo what kind of problems he could be having that would keep him from seeing his children, the government objected and requested a side-bar proffer from defense counsel.

Defense counsel proffered that Ferro would testify that Nalo's response to her question was that "there's a fat f__ing Italian looking to kill me," and that Nalo hastily asked Ferro whether she wanted to

bring the children up to New York and place them in the middle of that kind of situation. Defense counsel argued that Nalo's statement to Ferro -- that there was a "fat f__ing Italian looking to kill [him]" -- was admissible under Rule 803(3) of the Federal Rules of Evidence, i.e., the state of mind exception to the hearsay rule.

After hearing extensive colloquy on this issue, the district court ruled that Nalo's statements did not fall within the ambit of the state of mind exception to the hearsay rule, and struck from the record all testimony of Ferro that related in any way to the telephone conversation she had with Nalo just prior to his murder.

At petitioner's retrial, the district court once again precluded Ferro from testifying about the conversation she had with Nalo shortly before the murder. In

so doing, the district court explicitly adopted its ruling on this issue from the first trial.

(e) The Government's Failure to Provide Petitioner With 3500 Material

Throughout the first trial, the government failed to comply with its obligation to provide material pursuant to 18 U.S.C. § 3500 with respect to several of its witnesses. The government's handling of such material with respect to one witness, Spiros Fiorvantes, particularly with a "book" written by Fiorvantes in Greek, was especially reprehensible.

(i) The Fiorvantes Book

Defense counsel questioned Fiorvantes about whether he had attempted to contact various individuals from prison in an attempt to corroborate his story regarding petitioner. Fiorvantes revealed for the

first time during cross-examination that he had called approximately 50 individuals from prison, in the presence of the F.B.I., all of whom were listed in a book that Fiorvantes had provided to the government. According to Fiorvantes, the book contained names of individuals he had loaned money to in connection with his own barbut game (a Greek dice game) as well as the names of his loansharking victims, together with the amounts owed and the rates of interest. Fiorvantes testified that he wrote the book himself.

Defense counsel then moved for production of the alleged book. The prosecutor asserted that he did not know what book Fiorvantes was referring to and that he had already turned over all of the documents Fiorvantes had given to the government.

The following morning, the prosecutor, having since located the book

in question, provided it to the district court for an in camera review. The government, however, opposed production of the book to petitioner, arguing: 1) that the names in the book were "collateral" to anything in petitioner's case given that Fiorvantes had admitted being involved in making illegal gambling loans to numerous people and loansharking; and 2) that the names in the book were those of potential witnesses in another case against various alleged high ranking members of the Gambino organized crime family and that disclosure of the book might "jeopardize" that case.

After conducting an in camera review, the district court found that the entire book clearly constituted 3500 material, given that it was written in the witness' own handwriting and that there was no question that it related to his direct testimony. However, the court ordered

that the book preliminarily be disclosed only to defense counsel, and that they could not share or discuss the information contained in the book with anyone, including petitioner or his co-defendants.

On the fourth day of Fiorvantes' cross-examination, defense counsel was finally provided with an English translation of the book. However, defense counsel indicated that unless petitioner had the opportunity to review the book and help counsel with respect to the facts, the book was virtually worthless. Defense counsel indicated that they would consent to a protective order regarding the sharing or imparting of information within the book to any other third parties. Having found that the book constituted 3500 material, defense counsel maintained that the district court had no authority to prevent them from discussing the book with their clients pursuant to the Sixth

Amendment to the United States Constitution. The government, however, again opposed the release of the book to anyone other than defense counsel. The government argued -- contrary to law -- that the 3500 material that should be shared between counsel and their clients should be limited to that material relating to matters that the court would permit on cross-examination.

Although the district court recognized that delivering the book solely to defense counsel and prohibiting them from discussing its contents with their clients was essentially a meaningless gesture, it decided, over the objection of petitioner, to preclude defense counsel from discussing with their clients, with a limited exception, the contents of the book. The court emphasized that its decision was not predicated primarily on security reasons, but rather "where we are

going to go with this [book]", i.e., how would the book be used on cross-examination.

REASONS FOR GRANTING THE WRIT

I.

THE EXCLUSION OF TESTIMONY FROM NALO'S EX-WIFE REGARDING A CONVERSATION THAT SHE HAD WITH NALO JUST PRIOR TO HIS MURDER WAS CONTRARY TO SECOND CIRCUIT PRECEDENT AND DEPRIVED PETITIONER OF A FAIR TRIAL.

At trial, petitioner proffered the testimony of Vincenza Ferro, the ex-wife of Nalo, to establish that Nalo believed that Peter "Fat Pete" Chiodo, the government's main witness at trial, was looking to kill him. This evidence would have provided important evidence of a prior existing relationship between Nalo and Chiodo (a fact which Chiodo emphatically denied), and that Chiodo had a motive to kill Nalo independent of anything to do with petitioner.

Notwithstanding that this testimony would have supported the main theory of the defense -- that Chiodo had an independent motive to, and did, murder

Nalo -- the district court excluded the testimony, and the Court of Appeals for the Second Circuit refused to disturb that ruling.

By not permitting petitioner to offer evidence of Nalo's statement to his ex-wife, just prior to his murder, that Chiodo was looking to kill him, the district court deprived petitioner of a fair trial. The Second Circuit's own rulings in United States v. Harris, 733 F.2d 994 (2d Cir. 1984), United States v. DiMaria, 727 F.2d 265 (2d Cir. 1984), and United States v. DiNome, 954 F.2d 839 (2d Cir.), cert. denied, ____ U.S. ____, 113 S. Ct. 94 (1992) all confirm that testimony that directly relates to the declarant's then existing state of mind is admissible as an exception to the hearsay rule. See Fed.R.Evid. 803(3). Accordingly, this Court should grant certiorari to correct the Second Circuit's

unwarranted departure in this case from established Second Circuit precedent regarding the admissibility of state of mind evidence.

Preliminarily, in a long line of cases, including, inter alia, Harris, DiMaria and DiNome, the Second Circuit has held that when a declaration is admitted solely to prove the declarant's state of mind, it does not matter whether admissibility is predicated on the declaration being non-hearsay, or on the state of mind exception to the hearsay rule. See, e.g., Harris, 733 F.2d at 1004. Under either theory, the declarant's state of mind can be proven circumstantially by statements which are not offered for their truth. See United States v. Southland Corp., 760 F.2d 1366, 1376 (2d Cir.), cert. denied, 474 U.S. 825, 106 S. Ct. 82 (1985).

Courts have consistently held that declarations similar to those proffered in this case are admissible under the state of mind exception to the hearsay rule, especially when such statements tend to establish motive. For example, in United States v. DiNome, 954 F.2d 839, 846 (2d Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 94 (1992), the defendants were charged with, inter alia, the operation of an international stolen car ring. The government introduced hearsay statements of two homicide victims who were in the business of exporting cars. A declaration by one of the victims was, in substance, that he was going to see a lawyer regarding some car thieves. Furthermore, the second victim had expressed "incredulity at the fact that his competitor, [a defendant], seem to obtain cars without apparent effort." Id. at 846.

The Second Circuit found these declarations to be "clearly admissible" under the state of mind exception to the hearsay rule. As the court held, "[t]he statements in question established the victims' existing and ongoing suspicions concerning [the defendant's] exportation business and were relevant to show [the defendant's] motive to kill them. As such, they fell squarely within the exception." Id. (citing United States v. Donley, 878 F.2d 735, 737-38 [3d Cir. 1989]).

In this case, Nalo's declarations that "there's a fat f___ing Italian looking to kill me" and that he, therefore, did not want his children coming to New York, are -- like the declarations found to be admissible in DiNome -- clearly relevant and admissible, since they tend to establish that Nalo and Chiodo had a pre-existing relationship and

that Chiodo had a motive to kill him.

Moreover, since the Second Circuit found such declarations to be admissible against a criminal defendant, the court here certainly should have admitted the proffered testimony which was offered by petitioner in support of his defense. As the Second Circuit has consistently noted, hearsay declarations offered by an accused as part of his defense are subject to a less exacting standard of admissibility than declarations offered by the government against a criminal defendant. The higher standard prescribed for declarations offered against a criminal defendant results from the implication of the Confrontation Clause of the Sixth Amendment to the United States Constitution. However, the Confrontation Clause is not implicated when an accused offers hearsay declarations as part of his defense. See DiMaria, 727 F.2d at 272

n.6; Harris, 733 F.2d at 1005.

Moreover, the district court's function in determining whether the proffered testimony falls within the exception is limited to whether the statement relates to a then existing state of mind or to a past memory or belief offered to prove the fact remembered or believed. As long as the hearsay declaration evidences the declarant's present, as opposed to past, state of mind, it is admissible.

For example, in United States v. DiMaria, 727 F.2d 265 (2d Cir. 1984), the defendant, on trial for possession of stolen cigarettes travelling in interstate commerce, stated to approaching FBI agents, "I thought you guys were just here investigating white collar crimes; what are you doing here? I only came here to get some cigarettes real cheap." Id. at 270. The Second Circuit held that the

defendant's statement was improperly excluded by the district court, since the declaration fell within the state of mind exception by negating a present intent to possess stolen cigarettes, as opposed to bootleg cigarettes, the crime for which the defendant was charged.

Similarly, in United States v. Harris, 733 F.2d 994 (2d Cir. 1984), the defendant, on trial for drug charges, attempted to establish that he was aware that the informant was a government agent. In support of his defense, the defendant proffered the testimony of an attorney and his parole officer, who would have testified that the defendant believed that the government was trying to set him up and that an informant had brought a government agent to him. Id. at 1000-01. The Second Circuit held that the proffered testimony should have been admitted under the state of mind exception since it was a

declaration of the defendant's then existing state of mind. Id. at 1003-04.

Here, the district court disregarded controlling precedent and excluded the proffered testimony of Vincenza Ferro, Sammy Nalo's ex-wife, as inadmissible hearsay. As detailed in the Statement of Facts, pages 11-13, supra, the proffer, relating to a telephone conversation that Ferro had with Nalo several days before he was murdered, revealed that Ferro would have testified that Nalo told her that he did not want his two children to travel from Florida to New York to visit him over the upcoming holidays. When she asked what was so important that would keep him from seeing his children over the holidays, Nalo revealed to Ferro his fear that there was "a fat f__ing Italian looking to kill him", i.e., Peter "Fat Pete" Chiodo.

In his testimony at trial, Chiodo emphatically denied that he had a prior existing relationship with Nalo, much less, as petitioner maintained, that he loaned Nalo $100,000. The proffered testimony was therefore critical to and would have corroborated petitioner's defense that it was Chiodo, not petitioner, who in fact murdered Nalo.

Moreover, the proffered testimony was powerful evidence of Nalo's belief that he was in danger of being killed by Chiodo. Had this testimony been admitted, petitioner could have urged the jury to infer: 1) that Chiodo and Nalo had some prior existing relationship (a fact which Chiodo denied); and 2) that Chiodo possessed a motive to kill Nalo independent of anything to do with petitioner. Under Harris, DiMaria and DiNome, the testimony was admissible not only as circumstantial evidence of Nalo's

state of mind and as evidence of Chiodo's motive to murder Nalo, but also since it "would have supported the main theory of the defense." Harris, 733 F.2d at 1005. In holding that the erroneous exclusion of the proffered statements in Harris was not harmless, the Second Circuit, in a comment that is equally applicable to this case, stated that:

> While the jury might very well have rejected Harris's statements, as related by these witnesses, as untrustworthy, we 'cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error' . . . and, therefore, 'it is impossible to conclude that substantial rights were not affected.'

Harris, 733 F.2d at 1005 (citations omitted).

The Second Circuit's failure to follow its own precedents upon review of this case requires that certiorari be

granted here. This is especially so where the district court's erroneous exclusion of critical evidence of the victim's belief that someone other than petitioner was looking to murder him is of constitutional magnitude, having deprived petitioner of his Sixth Amendment right to a fair trial. See United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446 (1982) (the Compulsory Process Clause of the Sixth Amendment recognizes the right of a defendant to call witnesses on his own behalf material to his or her defense); Washington v. Texas, 388 U.S. 14, 18-19, 87 S. Ct. 1920, 1923 (1967)(same).

II.

BY PRECLUDING DEFENSE COUNSEL FROM SHARING 3500 MATERIAL WITH THEIR CLIENTS, PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS FIFTH AMENDMENT RIGHT TO A FAIR TRIAL.

Upon its review of the Fiorvantes book to determine whether, as the defense maintained, the book constituted 3500 material, the district court ruled that the entire book was clearly 3500 material. However, rather than rule, as explicitly required by the Jencks Act, 18 U.S.C. § 3500, and the applicable case law, that the book be disclosed to petitioner, the district court precluded petitioner from reviewing the book, and first sought to determine how the book would be used by petitioner at trial.[2]

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[2]See Clancy v. United States, 365 U.S. 312, 316, 81 S. Ct. 645, 648 (1961) (if defense is entitled to production of statement, it is not for the court to speculate whether it could have been utilized effectively); United States v. Derrick, 507 F.2d 868 (4th Cir. 1974) (it

Defense counsel argued that, having made the threshold determination that the book constituted 3500 material, the district court was obliged to order the book disclosed to counsel and petitioner. Moreover, defense counsel argued that it could not proffer how the book would be used at trial without first consulting, and then obtaining the assistance of, their clients.

Nevertheless, the district court continued the protective order and precluded defense counsel from discussing the contents of the book with petitioner, except with respect to those names in the

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is not the prerogative of the government nor even the court to pass upon the relevance or utility of producible statements); United States v. Polizzi, 500 F.2d 856, 893 (9th Cir. 1974), cert. denied, 419 U.S. 1120, 95 S. Ct. 802 (1975)("the prosecution is obliged to disclose to the defendant statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment.").

book which Fiorvantes had specifically mentioned during his direct testimony. The district court's plain error in not permitting petitioner to review the 3500 material with counsel requires that his conviction be reversed. See United States v. Truong Dinh Hung, 667 F.2d 1105 (4th Cir. 1981), cert. denied, 454 U.S. 1144, 102 S. Ct. 1004 (1982)(when production of 3500 material is ordered by the district court, the defendant has a constitutional right to view what has been disclosed).

On appeal, defense counsel was unable to demonstrate, short of speculation, how the Fiorvantes book would have actually been used at trial since there was (and still is) a protective order precluding them from discussing the contents of the book with their clients. Without being given the opportunity to review the Fiorvantes' book with petitioner, petitioner's counsel was prohibited from

arguing to the Court of Appeals -- as in the lower court -- how the book would have been used at trial -- i.e., why the district court's error should not be considered "harmless."

While the Court of Appeals initially noted that the failure of the district court to order disclosure of the book was error, it ruled that "any loss of a more complete opportunity to impeach Fiorvantes through the use of the notebook with appellants' input was harmless error." (p. 12a). Conducting its own review of the Fiorvantes book, the Second Circuit found the book to be cumulative to petitioner's impeachment of Fiorvantes and failed to find any perceived prejudice to petitioner by his "lack of unconditional access to the notebook." (p. 14a).

Like the district court's examination, the Second Circuit's review of the Fiorvantes book, in conducting its

analysis of whether the order precluding petitioner from viewing the book should be considered harmless error, was essentially meaningless. Only petitioner, together with counsel, can properly evaluate the book to comment to the Court on how meaningful or useful the book would be to his defense, how it would have been utilized at trial, and how the failure of the district court to order disclosure must be considered harmless error.

Moreover, the Second Circuit completely ignored the potential impact on the prosecution from a proper ruling requiring that the book be disclosed. Had the district court ruled that the government was required to produce the book to petitioner, as it should have, there is no way of knowing whether the government would have complied with the order, or whether it would have opted to have Fiorvantes' testimony stricken from

the record. Since the government maintained that disclosure of the book would have jeopardized an ongoing investigation of several alleged high-ranking members of the Gambino organized crime family, as well as the safety of potential witnesses, petitioner argued that the government may have opted for the latter option, i.e., the striking of Fiorvantes' testimony. The possibility of such a result, when applying a harmless error analysis to the district court's error, warranted a reversal. Nevertheless, the Court of Appeals failed to consider petitioner's argument and simply applied the harmless error analysis as if the material had been provided to petitioner.

In ruling that the district court's error in this case was harmless, and in misapplying the harmless error analysis by failing to consider petitioner's main

argument, the Second Circuit effectively participated in the denial of petitioner's constitutional rights to assistance of counsel and a fair trial. It is well-settled that it is not part of the district court's function to speculate, once material is determined to be producible under § 3500, whether it will be of any use to the defendant or admissible at trial. See Scales v. United States, 367 U.S. 203, 258, 81 S. Ct. 1469, 1501 (1961). Once production of 3500 material is ordered by the district court, the defendant has a constitutional right to see and know what is being produced. See Truong Dinh Hung, 667 F.2d at 1008 (when production of 3500 material is ordered, a defendant has the constitutional right to review what has been produced); cf. Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330 (1976) (district court's order precluding

defendant from consulting with his attorney in a 17-hour period violated defendant's Sixth Amendment right to the assistance of counsel); Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975) (defendant has the Sixth Amendment right to self-representation).

The circumstances in Truong Dinh Hung demonstrate why the district court's error -- and the Second Circuit's failure to correct it -- deprived petitioner of his constitutional rights to assistance of counsel and a fair trial. In that case, the district court provided certain documents to defense counsel so it could assist the court in determining whether they contained producible statements under § 3500. The court issued a protective order (similar to the one issued here) prohibiting counsel from disclosing the contents of the documents to their clients. On appeal, the defendants argued

that the court's protective order denied them of their Sixth Amendment right to counsel and their Fifth Amendment right to a fair trial. See Truong Dinh Hung, 667 F.2d at 1107-08.

The Fourth Circuit upheld the protective order, but only because the materials were found not to constitute 3500 material. The Court reasoned that since the district court was authorized under the Jencks Act to determine ex parte whether the materials reviewed were producible, it was not required to disclose these materials to defense counsel (let alone their clients) unless and until it determined that they were discoverable under the Act. Id. at 1108. As the court explicitly stated, however, "of course, in the usual case when production is ordered, a client has the [constitutional] right to see and know what has been produced." Id.

Here, of course, unlike the statements in Truong Dinh Hung, the district court held that the Fiorvantes book was a producible statement under the Jencks Act. Axiomatically, it therefore had no authority to preclude defense counsel from discussing the contents of the book with their clients, and its having done so -- and the Second Circuit's failure to set aside that ruling -- violated petitioner's Sixth Amendment right to counsel and Fifth Amendment right to a fair trial.

By failing to upset the lower court's ruling, the Second Circuit joined in the denial of petitioner's Sixth Amendment right to counsel and his Fifth Amendment right to a fair trial. Because of the importance of insuring that a criminal defendant be provided with material required to be disclosed to him pursuant to federal statute, so that he can

effectively participate in his own defense, this Court should grant certiorari to prevent any future circumventions of defendants' constitutional protections and to redress the unwarranted denial of constitutional rights that occurred in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 26, 1994

Respectfully submitted,

JAMES M. LAROSSA
LaROSSA, MITCHELL & ROSS
Attorneys for Petitioner
41 Madison Avenue
New York, New York 10010
(212) 696-9700

Of Counsel

James M. LaRossa
Andrew J. Weinstein
Susan G. LaRossa

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 288, 585, 586 August Term, 1993

(Argued: December 13, 1993

Decided: July 28, 1994

Docket Nos. 92-1634, 93-1117, 93-1409

UNITED STATES OF AMERICA,

Appellee,

V.

JAMES NICOLAPOLOUS; THEODORE POLATSIDIS; FOTIS HALKIS; DIMITRIOS VELENTZAS; STAVROS ORKOPOULOS; DIMITRIOS KARYTINOS and KOSTAS GIANNIKARIS,

Defendants,

MICHAEL GRILLO; PETER DRAKOULIS and SPYREDON VELENTZAS,

Defendants-Appellants.

B e f o r e: FEINBERG, WINTER, and PRATT, Circuit Judges.

Appeals from convictions for RICO, RICO conspiracy, gambling, and

loansharking offenses entered in the United States District Court for the Eastern District of New York (Denis R. Hurley, Judge). Appellants claim that the district court erred in refusing to allow them unconditional access to Jencks Act material. We hold that any error in denying access to the sought material was harmless.

ANDREW J. WEINSTEIN, New York, New York (James M. LaRossa, Karen F. Silverman, LaRossa, Mitchell & Ross, New York, New York, of counsel), for Defendant-Appellant Velentzas.

ROGER J. SCHWARZ, New York, New York, for Defendant-Appellant Grillo.

Peter Drakoulis, pro se.

KEVIN P. McGRATH, Assistant United States Attorney (Zachary W. Carter, United States Attorney for the Eastern District of New York, David C. James and Susan Corkery, Assistant United States Attorneys for the Eastern District of New York, Brooklyn, New York, of counsel), for Appellee.

WINTER, Circuit Judge:

Spyredon Velentzas, Michael Grillo, and Peter Drakoulis appeal from their convictions by a jury before Judge Hurley. Velentzas, Grillo, and Drakoulis were convicted of RICO, RICO conspiracy, gambling, and loansharking offenses arising out of their operation of an illegal gambling enterprise. Each appellant raises a number of arguments, as well as incorporating the arguments of one another pursuant to Fed. R. App. P. 28(i). In a summary order filed this day, we explain our reasons for rejecting all but one argument advanced by appellants. In this opinion, we address Velentzas's contention, joined in by the other appellants, that the district court's order requiring only conditional disclosure of certain material ruled by the district court to be within the ambit of the Jencks Act, 18 U.S.C. § 3500

(1988), requires the reversal of his conviction. For the reasons set forth below, we disagree because the district court's ruling was harmless. We therefore affirm.

BACKGROUND

The appellants were charged in a twelve count indictment with, inter alia, RICO, RICO conspiracy, gambling, and loansharking offenses, arising from appellants' participation in a large criminal organization based in Astoria, Queens. Evidence introduced at trial, much of which was derived from a hidden microphone at the organization's headquarters, established that the organization operated illegal dice games, called "barbut," as well as illegal poker machines and horse betting parlors. The organization also engaged in the making and collecting of extortionate loans to

players in these illegal games. The organization, which was headed by appellant Velentzas, was affiliated with the Luchese Crime Family.

At trial, Spyredon Fioravantes testified as one of the principal witnesses for the government. Fioravantes's testimony was relevant to most counts of the indictment against Velentzas, as well as the loansharking counts against Drakoulis. In essence, Fioravantes testified that he had operated illegal gambling and loansharking businesses in New York City, both in cooperation and in competition with Velentzas, for almost twenty years. During this time, Fioravantes acquired, and testified to, detailed firsthand knowledge of Velentzas and his associates' gambling and loansharking activities.

Fioravantes made no pretense of being a model citizen. In the course of his

direct testimony, he admitted to having been engaged in criminal activities for virtually his entire life. He thus admitted to having been involved in drug dealing, loansharking and related assaults, tax evasion, illegally entering the United States, running illegal gambling establishments, and working closely with the Gambino Crime Family to enforce territorial restrictions on his competitors. Moreover, Fioravantes acknowledged that at the time of his testimony he was a state prisoner serving a lengthy state sentence for dealing heroin. Fioravantes also admitted that he committed perjury during his testimony at his state drug trial.

Fioravantes was cross-examined over the course of four days. During the cross-examination, Fioravantes admitted that he had up to $250,000 in illegal loans outstanding at various times. He

also acknowledged that he had bribed policemen for years, and that Ralph Mosca, a Captain in the Gambino Crime Family, was his partner in several illegal barbut games. Velentzas's counsel specifically elicited Fioravantes's admission to participating in five separate beatings of delinquent debtors.

Fioravantes's cross-examination further revealed that he had kept a notebook in which he recorded, in Greek, the names, telephone numbers, and amounts outstanding for the recipients of his illegal loans. Fioravantes acknowledged that he had given the notebook to FBI agents who had debriefed him in connection with a criminal investigation of members of the Gambino Crime Family. The appellants' trial counsel immediately moved for the production of the notebook on the grounds that it constituted Jencks Act material, under 18 U.S.C. § 3500

(1988).

Upon locating the notebook in question, the government provided it to the district court for an in camera review. see 18 U.S.C. § 3500(c) (1988). The government, however, opposed production of the notebook to appellants on the grounds that the information in the notebook was cumulative in light of Fioravantes's admission of his loansharking, and that disclosure of the notebook threatened the safety and/or continued veracity of the individuals listed in it, who were potential witnesses in a separate, impending organized crime case.

Judge Hurley ruled that the notebook constituted Jencks Act material. In an attempt to accommodate the government's concerns, however, Judge Hurley preliminarily ordered that the notebook be disclosed to appellants' trial counsel,

but, by way of protective order, also ordered that counsel were not to disclose the contents of the notebook to their clients.

Once the notebook had been translated into English, appellants' trial counsel renewed their objections to the district court's ruling, arguing that they needed to share the contents of the notebook with their clients in order to make meaningful use of the information. In response to Judge Hurley's expressed concern that allowing defense counsel access to the information without an opportunity to share it with their clients was "essentially a meaningless gesture," the government repeated its concerns over the safety of witnesses. The government further represented that appellants were not charged with loansharking in connection with any of the loans recorded in the notebook, nor, with one exception,

were any of the individuals listed in the book alleged victims of appellants. The district court ruled that, because the notebook bore only on Fioravantes's credibility, none of the information in the notebook could be shared with appellants except for names contained in the notebook that Fioravantes had mentioned as debtors during his direct examination.

After Velentzas's counsel protested that, due to the frequent use of nicknames in the notebook, he could not tell who these individuals were without the aid of his client, Judge Hurley offered to have Fioravantes go through the notebook and indicate which persons he had mentioned in his testimony. Velentzas's counsel declined this invitation, and returned the notebook to the court. Drakoulis's counsel, however, used the notebook in crossexamining Fioravantes to illustrate

that it did not contain his client's name.

DISCUSSION

The Jencks Act, in relevant part, provides that:

> [a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

18 U.S.C. § 3500(b) (1988). "[S]tatement" is defined in relevant part as "a written statement made by said witness and signed or otherwise adopted or approved by him." 18 U.S.C. § 3500(e) (1988).

At trial, Judge Hurley ruled that the notebook in which Fioravantes kept records of his loansharking activities fell within the Jencks Act. In so ruling, Judge Hurley did not explicitly consider whether the notebook was a "statement" of the witness within the Act's definition, nor

does the government seem to have argued that it was not a "statement." We have serious doubts whether the notebook, which was essentially a contemporaneous business record rather than a narrative composed in the course of responding to an investigation, was a "statement" as contemplated by the Jencks Act. However, we need not resolve this issue because it is clear that, even if the notebook was Jencks Act material, any loss of a more complete opportunity to impeach Fioravantes through use of the notebook with appellants' input was harmless error.

While the harmless error doctrine must be applied "strictly" in Jencks Act cases, Goldberg v. United States, 425 U.S. 94, 111 n.21 (1976), failure to disclose the withheld material must be deemed harmless where there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of

the proceeding would have been different." United States v. Petrillo, 821 F.2d 85, 89 (2d Cir. 1987) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)); see also United States v. Sperling, 726 F.2d 69, 73 (2d Cir.) (failure to disclose Jencks Act material harmless error), cert. denied, 467 U.S. 1243 (1984); United States v. Mourad, 729 F.2d 195, 199-200 (2d Cir.) (same), cert. denied, 469 U.S. 855 (1984), and cert. denied, 472 U.S. 1007 (1985); cf. United States v. Truong Dinh Hung, 667 F.2d 1105, 1108 (4th Cir. 1981) (failure to allow defendants to aid their attorneys in inspecting alleged Jencks Act material harmless error), cert. denied, 454 U.S. 1144 (1982). A "reasonable probability," in this context, means "a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682 (opinion of Blackmun, J.) (quoting Strickland v.

Washington, 466 U.S. 668, 694 (1984)).

We perceive no prejudice suffered by appellants as a result of their lack of unconditional access to the notebook. The government represented that the loans recorded in the notebook bore no relevance to the charges in this case. After reviewing the notebook in camera, Judge Hurley concluded that it was useful to the defense only insofar as it furthered the impeachment of Fioravantes. However, the material already available to the defense to impeach Fioravantes's credibility, including evidence of his loansharking, was abundant to say the least.

Moreover, there appears to be no non-cumulative use that appellants could have made of the notebook in attacking Fioravantes's credibility. Fioravantes admitted to extensive loansharking activity as well as other criminal activity. Rule 608(b) of the Federal

Rules of Evidence bars the introduction of extrinsic evidence of specific instances of past misconduct to attack the credibility of a witness but gives the judge discretion to permit inquiry into such matters during cross-examination.[1] See Chnapkova v. Koh, 985 F.2d 79, 82 (2d Cir. 1993). Judge Hurley allowed Velentzas's counsel to ask Fioravantes about five separate instances of his loansharking and its attendant assaults. In the course of colloquy over the production of the notebook, Judge Hurley advised defense counsel that he believed this area had been fully explored through cross-examination and that he would not permit the defense to present extrinsic evidence of Fioravantes's loansharking by calling the debtors listed in the notebook as witnesses.

Appellants argue, however, that, because they still have not had an

opportunity to fully share the notebook's contents with their clients, they cannot say how they would have used the notebook at trial. Although we acknowledge the premise of appellants' arguments, we are unpersuaded of their conclusion. Appellants have failed to suggest how the material might conceivably have aided them beyond providing virtually irrelevant details of loansharking that Fioravantes freely admitted to at trial. Further, our independent examination of the withheld material persuades us that it does not bear any apparent usefulness beyond substantiating the existence of loansharking, which Fioravantes admitted.

Finally, Fioravantes's testimony was not the only evidence showing the appellants' commission of the crimes of which they were convicted. See Petrillo, 821 F.2d at 90 (distinguishing cases finding that withheld impeachment evidence

prejudiced defense on grounds that in those cases "witness whose credibility was at issue supplied the only evidence linking the defendant(s) to the crime"). In fact, the jury heard tape recordings of Velentzas, Drakoulis, Grillo, and others discussing their gambling and loansharking activities.

The judgments of conviction are therefore affirmed.

FOOTNOTE

1. Rule 608(b), in relevant part, provides that:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Fed. R. Evid. 608(b).